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No. 97-1454

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ANCHORAGE EDUCATION ASSOCIATION
and NEA-ALASKA,
Petitioners,

v.

REBECCA L. PATTERSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

As stated in the Petition for Writ of Certiorari ("Pet."), this case presents in the public sector the question now pending before this Court under the Railway Labor Act in *Air Line Pilots Association v. Miller*, No. 97-428. As we explained, the fact that this case arises under 42 U.S.C. § 1983, while *Miller* arose under the Railway Labor Act, was not deemed significant by the Ninth Circuit in this case or by the parties in *Miller*, and is no ground for denying certiorari. Rather, that distinction is relevant only to determining whether the most appropriate disposition upon grant of certiorari would be to remand this case to the Ninth Circuit for reconsideration, or instead to set the matter for briefing and argument in this Court. *See* Pet. 12, 15.

Although respondents devote much of their Brief in Opposition ("Opp."), to arguing the merits of requiring

"exhaustion" in a case brought under § 1983—and we respond to those arguments briefly at pp. 5-6 *infra*—respondents' principal contention is that we have "mischaracterize[d] the issue decided by the lower court," Opp. 6, because, in respondents' view, "[t]his case is not about a nonmember teacher's obligation to exhaust the unions' impartial decisionmaker process," but instead "is about a court's effort to refer damages calculations to a non-Article III decisionmaker." *Id.* There is no force to that contention.

1. The question respondents declare *not* to be presented here—"a nonmember teacher's obligation to exhaust the union's impartial decisionmaker process," Opp. 6—is precisely the question the Ninth Circuit decided.

The Ninth Circuit stated the question presented as:

> [W]hether nonmembers can be forced to arbitrate a union's chargeability determinations before seeking relief in federal court. [App. 16a]

Explaining that it "agree[d] with the [decision of the] D.C. Circuit . . . [in] *Miller*," App. 18a, the Ninth Circuit answered that question as follows:

> We therefore hold that nonmembers are not required to exhaust union remedies to which they did not agree before challenging the chargeability determinations in federal court. [*Id.*]

In the end, respondents acknowledge that the Ninth Circuit *did* decide the question presented in *Miller* and in our certiorari petition, and respondents are reduced to arguing that the court *should not have* decided that question. *See* Opp. 17 (describing what respondents characterize as "the panel's . . . error" in defining the issue to be decided). This quixotic contention ignores the true posture of the case.

The district court considered at length whether respondents should be required "to use the arbitration procedures" established by AEA to resolve chargeability objections, or whether instead "[the] court should decide chargeability issues." App. 41a. Emphasizing that it had found no

deficiencies in AEA's agency fee *procedures*, but only in certain aspects of AEA's agency fee *notice*, the district court held that respondents were not free to avoid the arbitration process and instead present their chargeability disputes in court. App. 41a-44a, 46a.[1] The district court ruled that "the arbitration procedures established by defendants . . ., utilizing the services of the American Arbitration Association . . . must be utilized by employees who wish to challenge the Associations' calculation of chargeable and nonchargeable items for the purpose of establishing service fees." App. 60a-61a. Accordingly, "all issues of chargeability for the 1992-93 year between [respondents] and [AEA], including issues raised by [respondents] herein with regard to litigation expenses, organizational maintenance and lobbying . . . shall be determined . . . through arbitration, and chargeability issues may not be brought to the court for determination until arbitration is completed." App. 61a.

What is more, the district court required arbitration for the very reasons that have been advanced in *Miller* by the petitioner and its *amici*: the court concluded that there is no proper basis for a nonmember to complain in court of a union's chargeability determinations if the nonmember has bypassed the impartial decisionmaking process established by the union to consider objections to the union's proposed charges. *See* App. 41a-46a, citing, *inter alia*, *Hudson v. Chicago Teachers Union, Local 1*, 922 F.2d 1306, 1314 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991) ("Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the requirements that an impartial decision-

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[1] Far from requiring arbitration *because* of the deficiencies the district court found in AEA's notice, as respondents suggest, the district court required arbitration *despite* those deficiencies. *See* App. 41a, 43a, 46a. This was unexceptional, as respondents made no showing that the deficiencies in the notice (described in the certiorari petition at 4) were such as to make arbitration unfair or inappropriate.

maker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending").[2]

Although, as respondents emphasize, the Ninth Circuit characterized the arbitration process required by the district court as involving questions of "damages" or "relief," App. 15a, 16a, that characterization did not play any part in the Ninth Circuit's analysis of the question presented. Rather, the Ninth Circuit saw this case as presenting the same issue as *Miller*, and it decided the case accordingly. *See* App. 16a-18a.

The court's perception of the issue was correct. Under the district court's order, the only matter to be arbitrated is whether AEA charged objecting nonmembers for activities that were not lawfully chargeable to them, such that the objectors would be entitled to a partial refund. *See* App. 60a-61a. (As the district court observed, respondents identified "litigation expenses, organizational maintenance and lobbying" as activities for which they allegedly had improperly been charged. App. 61a.) Such a refund would not constitute "damages" for AEA's deficient *notice*, as respondents suggest: on the contrary, an objector is entitled to a refund of the nonchargeable portion of an agency fee even if a union's notice was perfect, and "the issue of whether the notice contains a verification is irrelevant to whether the exclusive representative properly calculated the proportionate share of total chargeable expenses." *Hohe v. Casey*, 956 F.2d 399, 416 (3d Cir. 1992).

Thus, notwithstanding respondents' effort to recast this case as one involving "damage calculations," the issue

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[2] In a belabored argument, respondents make much of the fact that AEA's impartial decisionmaking process utilizes an arbitrator selected by the American Arbitration Association rather than by the nonmembers. Opp. 22-24. For the reasons that have been presented in *Miller* by the petitioner and its *amici*, respondents' attack on the use of AAA-appointed arbitrators lacks merit. In any event, this factor does not distinguish the present case from *Miller*, because the same AAA procedure was utilized in *Miller*.

decided by the Ninth Circuit is the same as the issue pending decision in *Miller*: should objections to the chargeability of particular union activities be heard by the courts if those objections were not presented to the impartial decisionmaker provided by the union.[3]

2. Respondents present a lengthy argument on the merits of whether "exhaustion" of a union's impartial decisionmaking process can be required where a nonmember has sued under § 1983. Nothing in that exegesis constitutes a ground for denying certiorari,[4] and this is not

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[3] In yet another attempt to rewrite the decision below, respondents contend that the Ninth Circuit should be understood as having determined that respondents cannot be charged *any* fee for the year at issue, Opp. 5, and therefore the need to examine AEA's chargeability determinations, whether by arbitration or in court, has been "obviated." Opp. 21. That is nonsense. The Ninth Circuit noted without disapproval that the district court had rejected respondents' claim for "a full refund of all collected fees." App. 15a. The district court's rejection of that claim was consistent with well-settled law. *See, e.g., Weaver v. University of Cincinnati*, 970 F.2d 1523, 1533-34 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993); *Hohe v. Casey*, 956 F.2d at 416; *Lowary v. Lexington Local Board of Education*, 903 F.2d 422, 432-33 (6th Cir.), *cert. denied*, 498 U.S. 958 (1990); *Gilpin v. AFSCME*, 875 F.2d 1310, 1314-16 (7th Cir.), *cert. denied*, 493 U.S. 1080 (1990). Respondents would have it that the Ninth Circuit, with no discussion whatsoever, reversed the district court *sub silentio* on the "full refund" issue, parted company with the decisions of every circuit that has considered the issue, and held (again *sub silentio*) that a union must entirely forfeit the collection of agency fees, even for matters concededly germane to collective bargaining, if there was any deficiency in the union's notice for a particular year. That untenable suggestion cannot be squared with the Ninth Circuit's explicit holding that the district court's error lay in declining to adjudicate respondents' "*challeng*[*e*] [*to*] *the* [*union's*] *chargeability determinations*." App. 18a. Plainly, the court of appeals did not set the fee at zero and thus "obviate" the need for review of AEA's chargeability determinations, as respondents suggest. Rather, what the Ninth Circuit held (as the D.C. Circuit held in *Miller*) is that the union's chargeability determinations should be reviewed in the first instance by the district court rather than by an arbitrator.

[4] Respondents themselves state that "the circuits have conflicted" on the question respondents believe is presented by this case. Opp.

the time for a full response on the merits. We merely note two points.

First, none of this Court's § 1983 cases holding that exhaustion of remedies was not required involved a situation where a litigant was permitted to bypass a decisionmaking process *that a private party had been required by federal law to create in order to resolve the very dispute the litigant wished to take to court.*

Second, respondents correctly note that a union may violate constitutional requirements not only by spending objecting nonmembers' funds in a manner that improperly forces objectors to subsidize ideological activity, but also by failing to establish proper procedures for collecting agency fees. *See* Opp. 25-26. However, where a union escrows funds as required by *Hudson* and provides an impartial decisionmaking process to consider any objections to the amount the union proposes to charge, no valid First Amendment claim—whether of forced subsidization or of improper procedures—arises from collecting and spending the funds of a nonmember who fails to present an objection through the impartial decisionmaking process. *See* Pet. 14-15. Hence, the fundamental problem with respondents' position is not that respondents failed to exhaust in arbitration a First Amendment claim that otherwise would be cognizable under § 1983; it is that AEA's collection and expenditure of funds of nonmembers who did not avail themselves of the impartial decisionmaking process did not violate the First Amendment in the first place.

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19. And, on the issue framed in the certiorari petition, which respondents incorrectly maintain is not presented, respondents inexplicably assert both that "every court agrees with the Ninth Circuit," Opp. 18, and that "one court . . . has reached a contrary conclusion." *Id.*

CONCLUSION

The petition for certiorari should be granted and the case should either be remanded for reconsideration in light of *Miller* or set for briefing and argument in this Court.

Respectfully submitted,

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